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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-177

BENJAMIN BARRY KRAMER and
RANDY THOMAS LANIER

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the petitioners' convictions and mandatory life sentences without parole under 21 U.S.C. Section 848(b) for acting as principal administrators, organizers, or leaders of a "continuing criminal enterprise" consisting of a series of violations of the narcotics laws violate the constitutional prohibition on ex post facto law where the instructions given to the trial jury did not require the jury to find that after the effective date of 21 U.S.C. Section 848(b), October 27, 1986, the petitioners acted as the principal administrators, organizers, or leaders over a continuing series of violations of the narcotics laws.

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Pursuant to Supreme Court Rule 15.6, petitioners Benjamin Barry Kramer and Randy Thomas Lanier, through their undersigned counsel, respectfully submit

this brief in reply to the arguments raised in the government's brief in opposition to the petition for certiorari.

ARGUMENT

I. The Instructions Given the Jury in this Case did not Require the Jury to Find that the Petitioners Acted as the "Principal Administrators" Over a Continuing Series of Drug Offenses After the Effective Date of 21 U.S.C. Section 848(b) in Order to Return to a Verdict of Guilty on the CCE Count in the Indictment.

In our petition for certiorari, we submitted that the instructions given to the jury in this case permitted the jury to return a verdict against the petitioners on Count 1 of the Indictment in violation of the constitutional ban on ex post facto law. We posed this argument on two levels: First, we submitted that the district court's instructions on the CCE count did not require the jury to find that the petitioners had acted as the "principal administrator, organizer, or leader" (or

"principal administrator," for short) over even a single narcotics offense after the effective date of 21 U.S.C. Section 848(b). Second, we submitted that to convict the petitioners on the CCE count, the jury was required to look to the petitioners' pre-enactment conduct to find at least one of the narcotics offenses constituting the series of offenses over which the petitioners functioned as "principal administrator." (See Petition for Certiorari at 23-31).

In its brief in opposition, the government does not endeavor to show that, on either level, the issue is not worthy of a grant of certiorari. The government does attempt to meet the first level of our argument by submitting that the jury probably understood that it had to find that the petitioners acted as supervisors over at least one narcotics felony after Section

848(b) became law, but the government's citations to the record do not support its arguments. As to the second level of our argument, the government has not responded at all.

A.

Under a plain-meaning reading, the district court's instruction permitted the jury to return a guilty verdict on the CCE count if the jury found that the petitioners had at one time functioned as "principal administrators" of a criminal enterprise, that this enterprise had continued past the effective date of Section 848(b), October 27, 1986, and that, after this date, either the petitioners had committed a single narcotics felony or "the enterprise" had grossed in excess of $10 million. Put another way, the district court's instruction did not require the jury to find that the petitioners had continued to

function as "principal administrators" after 21 U.S.C. Section 848(b) became law.

In its brief in response, the government concedes that the instructions given the jury were "ambiguous" (Brief in Response at 9), but argues nonetheless that the jury must have understood that it had to find that the petitioners continued to function as "principal administrators" after the effective date of Section 848(b).[1] In support of this argument, the government

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[1] At Page 10 of its Brief in Opposition, the government also argues, as it argued below (see Appellate Brief of the United States at 49), that the petitioners have somehow waived any argument based on the plain meaning of the jury instructions through their statements during closing argument to the jury. As we noted in the court below (see Appellant's Reply Brief at 10-11), the government has never cited a single authority for the proposition that a party's attempts to give a palliative interpretation during closing argument to a patently unconstitutional jury instruction can act as a waiver of its objections to that instruction, particularly where the party has proffered a jury instruction of its own that comports with the Constitution.

relies on citations to the closing arguments of counsel. According to the government, both prosecution and defense counsel interpreted the district court's jury instructions to require a finding that the petitioners functioned as "principal administrators" after October 27, 1986, and conveyed that understanding to the jury during closing argument. But the government's citations to the record do not support this conclusion. Instead, those record citations disclose that counsel argued that the instructions required the jury to find that the petitioners "committed acts" after the effective date of Section 848(b) (Brief in Opposition at 11 n.4 (quoting Tr. 10,379)), or that the petitioners "were involved after that period of time" (Ibid. (quoting Tr. 10, 379)), or that their "specific activities" were to be "measure[d]" after that date (Brief in

Opposition at 10 (quoting Tr. 10,230)), or that "the enterprise" (whatever that term may have meant in this context[2]) itself continued past that date. (Id. at 10 (quoting Tr. 10,115)).

It appears to be the government's position that the ex post facto clause is not offended so long as the jury understood it had to find that the petitioners did something -- anything -- after the date on which 21 U.S.C. Section 848(b) became the law of the land. This is not, however, what the ex post facto clause requires. It requires, at the very least, a finding that

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[2] As observed in our petition for certiorari, an "enterprise" is not an essential element of a Section 848(b) offense; nor is the term "enterprise" defined by the statute. (See Petition for Certiorari at 24 & n.7). Instead, the term is used as a short-hand form for the "continuing series of violations" of the narcotics laws that is the sine qua non of a CCE offense. See 21 U.S.C. Section 848(d)(2) (West 1987).

the petitioners engaged in the precise conduct for which Congress altered the legal consequences by enactment of new legislation. See Miller v. Florida, 482 U.S. 423, 430 (1987); Weaver v. Graham, 450 U.S. 24, 29, 31 (1981).

B.

The conduct that fits that description in this case concerns whether the petitioners acted as the "principal administrators" over a continuing series of drug violations. While the government has attempted to justify the decision below by showing that the jury might have understood that it had to find that the petitioners acted as "principal administrators" over one drug felony after Section 848(b)'s effective date, the government has not attempted to show that this alone would square the decision below with the requirements of the ex post facto clause, much less to challenge

the merits of a grant of certiorari on this issue.

As the straightforward statutory analysis in our petition for certiorari demonstrated, a person can be held liable under the 1986 version of Section 848(b) only if that person functioned as a "principal administrator" over a sufficient number of drug violations to constitute a "series." (See Petition for Certiorari at 19, 24, 25-26). Whether that number is two (as the Seventh Circuit stated below) or three (as every other circuit court to consider the issue has held), the jury could not have found that the petitioners functioned in this role after October 27, 1986, since, as the court below found, only one drug transaction included within the series charged occurred after that date, the so-called "San Francisco load", which took place some two weeks after Section 848(b)

became law. See United States v. Kramer, 955 U.S. 479, 482-83, 486 (7th Cir. 1992).

Since six of the seven charged drug transactions occurred before the effective date of Section 848(b), to find that the petitioners had acted as the "principal administrators" over a sufficient number of drug transactions to constitute a "series" -- the only element of a CCE offense that makes it a "continuing" offense -- the jury was forced to consider whether the petitioners played this role in at least one of the transactions occurring before Section 848(b) went into effect on October 27, 1986. Before that date, however, the role of "principal administrator" did not exist. That term was not included within the prior version of the CCE statute, and conduct that fit that description was without any independent legal significance until the 1986 version of Section 848(b)

became law. Yet the jury had to find such pre-enactment conduct by the petitioners to return a guilty verdict on the CCE count in this case. It is this change in the legal significance of the petitioners' pre-enactment conduct that makes this case truly worthy of a grant of certiorari.

C.

As the government observes in its brief, the petitioners maintained in the courts below that the enactment of 21 U.S.C. Section 848(b) on October 27, 1986, created a new substantive offense rather than a sentencing enhancement provision for an existing offense. But whether Section 848(b) is a new substantive offense or a sentencing enhancement provision, petitioners' convictions violated the ex post facto clause, since that clause requires, at a minimum, that new conduct proscribed by Congress (be it a new element

of a substantive offense or a new factor in a sentencing enhancement scheme) be proved by evidence of post effective date acts by the defendant.

What the substantive offense/sentencing enhancement distinction does bear upon is the question whether venue was laid in the Southern District of Illinois consistent with the ex post facto guarantee. The government observes that the petitioners have cited no precedent requiring that venue be established solely by an act in the district post dating the effective date of a new penal statute. It is equally true, however, that the government has cited no authority for its argument that venue may be established in a district by proof of an act that pre-dates by years the effective date of the statute

which makes that act illegal.[3] In any event, it would seem that this dearth of authority on either side, when combined with Congress's penchant for enacting new penal laws with each passing session, makes this issue particularly worthy of certiorari being granted.

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[3] The government also argues that subjecting venue requirements to ex post facto analysis would not serve the policy interests of either. (Brief in Opposition at 13). This argument appears at odds with the construction given the ex post facto clause by this Court, which has applied the clause to the abrogation of lesser included offenses, see **Kring v. Missouri**, 107 U.S. 221 (1883), to jury composition, see **Thompson, Utah**, 170 U.S. 343 (1898), and to parole requirements, see **Weaver v. Graham**, 450 U.S. 24 (1981). Furthermore, the policy behind venue provisions acknowledged by the government -- to "safeguard[] against the unfairness and hardship involved when an accused is prosecuted in a remote place" (Brief in Opposition at 13 (quoting **Platt v. Minnesota Mining & Mfg. Co.**, 376 U.S. 240, 245 (1964))) -- would appear to be implicated whenever a defendant is called to answer in a remote jurisdiction for an act done years before that particular act was proscribed by Congress.

II. The Decision Below Cannot be Reconciled with the Decision of the Second Circuit Court of Appeals in United States v. Torres, 901 F.2d 205 (2d Cir. 1990).

The Second Circuit's decision in United States v. Torres, 901 F.2d 205 (2d Cir. 1990), conflicts directly with the Seventh Circuit's decision in this case, not just on the issue whether Section 848(b) is a substantive offense as opposed to a sentencing enhancement provision, but on the question of the application of the ex post facto clause to the "principal administrator" element of an 848(b) offense as well. In its brief in opposition, the government attempts to distinguish the cases factually; but closer scrutiny reveals them to be indistinguishable.

As the government observes, Torres involved a "straddle offense," in that the defendants were accused of being the "principal administrators" over a continuing

series of drug offense during a one year period that straddled the effective date of Section 848(b). This case, too, however, was a "straddle offense," since the Indictment charged that the series of drug violations began well before Section 848(b)'s effective date and continued thereafter. Indeed, all but four months of the seven year period alleged in the Indictment (and all but one of the seven charged drug offenses) occurred before the 1986 version of Section 848(b) became law.

Here, just as in **Torres**, the district court's instructions permitted the jury to rely on both the pre-enactment and the post-enactment drug violations in determining whether the defendants had functioned as "principal administrators." If anything, the ex post facto violation is more compelling here. In **Torres**, the government established that a sufficient

number of drug offenses had occurred after Section 848(b)'s effective date to constitute a "series." United States v. Torres, 901 F.2d at 229. The only problem was that the jury was not instructed that it had to rely solely on these post-effective date drug violations in determining whether the defendant had been the "principal administrators." Id.

Here, it is uncontested that only one transaction that was part of the series alleged occurred after the effective date of Section 848(b). Consequently, the jury could find a "series" of offenses only if it considered drug violations that occurred before October 27, 1986, in determining whether the petitioners had functioned in the role proscribed by Congress as of that date, "principal administrator." In other words, a properly instructed jury would have had to have concluded that there was an

insufficient number of offenses after October 27, 1986, to satisfy that which the petitioners, as "principals," were accused of actually "administering" -- a "continuing series" of violations of the drug laws.

CONCLUSION

Based on the foregoing, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to the Seventh Circuit Court of Appeals to review that court's decision in this case.

Respectfully submitted,

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